Supreme Court, U. S.
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No. 80-80

IN THE

Supreme Court of the United States

October Term, 1980

PRINCE GEORGE'S PROPERTIES, INC.
Appellant,

vs.

PRINCE GEORGE'S COUNTY, *et al.*,
Appellees.

On Appeal From the
Court of Appeals of Maryland

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellees Prince George's County, Maryland, and County Council of Prince George's County, by their attorneys, Robert B. Ostrom, Michael O. Connaughton, and Steven M. Gilbert, respectfully move the Court for dismissal of this appeal, or, in the alternative, for affirmance of the judgment and order entered below. The grounds for this motion are as follows:

I

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In its jurisdictional statement, appellant Prince George's Properties, Inc. (hereinafter "PGP") appears to set forth the following questions:

> 1. Whether PGP was required to exhaust administrative remedies prior to suing the zoning authority for damages for rezoning its property, when it claimed the remedies were unconstitutional because they did not provide for trial by jury.
>
> 2. Whether PGP's declaration at law in state court for damages against the zoning authority for rezoning its land states a cause of action under the Fifth and Fourteenth Amendments.

The questions as stated here are summarized from the various statements and points of argument included in PGP's jurisdictional statement.

Neither question is a substantial one under federal law, and neither merits full review by this Court.

The first question appears to be founded on a claim that one has a constitutional right to a jury trial in a civil case in state court. But this Court has never held that the due process clause of the Fourteenth Amendment incorporates the jury trial provisions of the Seventh Amendment. A litigant has no federal constitutional right to trial by jury in a civil action brought in state court. *Curtis v. Loether,* 415 U.S. 189, 192 n.6 (1974); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.,* 284 U.S. 151, 155 (1931); *Wagner Elec. Mfg. Co. v. Lyndon,* 262 U.S. 226, 232 (1923); *New York Cent. R. Co. v. White,* 243 U.S. 188, 208 (1917); *see*

Colgrove v. Battin, 413 U.S. 149, 169 n.4 (1973) (dissenting opinion); *Brady v. Southern Ry. Co.,* 320 U.S. 476, 479 (1943). The recent discussion in *Parklane Hosiery Co. v. Shore,* ____ U.S. ____, ____, 99 S.Ct. 645, 655-657 (1979) (dissenting opinion) indicates some historical bases for the Seventh Amendment and, indirectly, why this Court has never required state courts to follow it.

Second, the question regarding a right to damages for the rezoning of private property was resolved by the Maryland courts by deciding that PGP would have a right, in an appropriate proceeding, to have the validity of the zoning of its property tested and ruled upon. Jurisdictional Statement at 3a; MD. ANN. CODE, Art. 66D §8-106 (1978 Repl. Vol. & 1979 Cum. Supp.). This question as to the procedure Maryland affords civil litigants asserting private property rights has no federal content or importance.

Third, PGP has never claimed in prior proceedings, and does not claim in its jurisdictional statement, that Maryland's procedure confining judicial review of a zoning action to validity, without the possibility of an award of damages, is unconstitutional *because* review is restricted to validity. *Cf. Agins v. City of Tiburon,* ____U.S. ____, ____, 100 S.Ct. 2138, 2143 (1980) (question "whether a State may limit the remedies available to a person whose land has been taken without just compensation" not considered). PGP's claims in this case have been restricted to its "taking" argument, its argument that taking is a factual issue, and its assertion that trial by jury is required.

It is submitted that PGP's federal constitutional claims are so insubstantial that this Court should decline to note jurisdiction. Rule 16.1(b), Supreme Court Rules.

II.

THE FEDERAL QUESTIONS PRESENTED HERE WERE NOT RAISED WITH EFFECT BELOW AND WERE NOT PASSED ON BY THE COURTS BELOW.

It was held in *Street v. New York,* 394 U.S. 576, 581-582 (1969), that this Court's jurisdiction on appeal from a state court depends on the proper presentation of a federal constitutional question below. The Court, by Mr. Justice Harlan, also stated:

> [W]hen . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Id. at 582.

The opinion of the Court of Special Appeals of Maryland (Jurisdictional Statement at 2a-4a), which is the only written opinion in this case, did not pass on either of the questions PGP seeks to raise in this Court. That court *assumed* an unconstitutional taking of PGP's property and held that PGP's rights under Maryland law were improperly asserted in an action at law for damages.

The questions PGP raises here are so insubstantial and were so ineffectively asserted below that the Maryland courts did not pass on them. Yet "taking" claims in general, *e.g., Maryland-Nat'l Cap. Park & Pl. Comm'n. v. Chadwick,* 286 Md. 1, 405 A.2d 241 (1979); *County Council v. District Land Corp.,* 274 Md. 691, 337 A.2d 712 (1975); *Mayor & Council v. Stone,* 271 Md. 655, 319 A.2d 536 (1974); *Mayor & City Council v. Borinsky,* 239 Md.

611, 212 A.2d 508 (1965), have been of great interest in Maryland in zoning and similar types of cases.

It is submitted that the insubstantiality of PGP's federal claims is supported to a great degree by the failure of the Maryland courts below to pass on them. Rule 16.1(b), Supreme Court Rules.

III.

THE JUDGMENT AND ORDER BELOW REST ON AN ADEQUATE NON-FEDERAL BASIS.

PGP's appeal rests not on its assertion that confining the remedy in zoning cases in Maryland to a declaration of validity is itself unconstitutional under the Fourteenth Amendment. Rather, PGP says that the remedy in Maryland is unconstitutional because it is deprived of a jury trial. But since jury trials are not constitutionally required in state courts in civil cases, and since Maryland courts in this case have said that a testing of the subject rezoning's validity is available, the judgment below is supported by the ruling that there are remedies other than the one PGP chose in bringing this action. There is a complete and adequate non-federal basis for the actions of the Court of Appeals and Court of Special Appeals of Maryland in this case. *See Wolfe v. North Carolina,* 364 U.S. 177, 195 (1960); *cf. Orr v. Orr,* ____ U.S. ____, ____, 99 S.Ct. 1102, 1109 (1979).

Since there is an adequate non-federal basis for the judgment and order entered below, this Court should decline to note jurisdiction. Rule 16.1(b), Supreme Court Rules.

IV.

THIS APPEAL HAS NOT BEEN TAKEN IN FULL COMPLIANCE WITH THIS COURT'S RULES.

As a final point, appellees would note PGP's failure to comply with this Court's rules, in several respects.

First, PGP does not indicate in its notice of appeal "the statute or statutes under which the appeal to this Court is taken," as required by Rule 10.2. No statutory citation is given in the jurisdictional statement, either, as is required by Rule 15.1(e)(iii). It is assumed herein that this appeal is filed under 28 U.S.C. §1257(2)(1970).

Second, appellees were not notified, as required by Rule 12.3, of the date of docketing and the docket number of this case at the time this appeal was filed.

Third, if this appeal is filed to challenge the constitutionality of MD. ANN. CODE, Art. 66D §8-106 (1978 Repl. Vol. & 1979 Cum. Supp.), PGP appears not to have served the notice required by Rule 28.4(c) on the Attorney General of Maryland. (The cited statute is a public general law of the State of Maryland, and Prince George's County is not an "agency" of the State.)

None of these violations of this Court's Rules are serious, perhaps, but taken together they amount to one additional reason why this Court should decline jurisdiction in this case.

CONCLUSION

For the reasons stated above, this appeal should be dismissed, or the judgment and order below should be affirmed.

Respectfully submitted,

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